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No. 966

UNITED STATES SUPREME COURT

United States of America

In the Matter of the Petition of Antonio Finocchairo, for Writ of Certiorari to Review a Decree of the Court of Appeals of the State of New York in a Proceeding entitled, "In the Matter of the Application of Antonio Finocchairo, Petitioner-Respondent, against Joseph P. Kelly, Commissioner of Motor Vehicles, Respondent-Appellant", Pursuant to Title 28, U. S. Code 1257, Subdivision 3.

PETITION AND AFFIDAVIT

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PETITION AND AFFIDAVIT

The petition of Antonio Finocchiaro, residing at 1524 Five Mile Line Road, Penfield, New York, respectfully shows to the Court:

A. The official report of the opinion delivered in the New York State Court of Appeals may be found in NY 2nd appended hereto.

B. The grounds on which jurisdiction is invoked in this Court are as follows:

1. The order of the Court of Appeals sought to be reviewed is dated March 1, 1962 and was entered in Monroe County Clerk's Office, Rochester, New York, March 30, 1962.

2. No order for reargument has been applied for. No order granting extension of time within which to petition for certiorari has been granted.

3. The statutory provision conferring jurisdiction on the

U. S. Supreme Court to review the order in question by writ of certiorari is Title 28 U. S. Code, Section 1257, Sub. 3.

C. The questions presented for review are as follows:

1. Does a person have a constitutional right to the aid of counsel before submitting to a chemical test to determine the alcohol contents of his blood after arrest on a charge of driving while intoxicated?

2. Were the petitioner's constitutional rights invaded by refusal of a New York State Trooper to grant petitioner's request for counsel prior to submitting to a blood test?

3. Is the right to counsel mandated by due process of law confined only to criminal prosecutions?

4. Is the right to counsel mandated by due process of law inoperative in a civil administration proceeding?

5. Does the fact that petitioner was acquitted of the charge of driving while intoxicated nullify his right to counsel in the civil administration proceeding?

6. Is a defendant, charged with crime, to be denied his constitutional right to counsel subject to reasonable limitations, by being told to take a blood test in a civil administration proceeding?

7. Was the conditional refusal of the petitioner to take a blood test without the advice of counsel a basis for revocation of his driver's license?

D. The constitutional and statutory provisions which the case involves are:

1. Amendment 5, Constitution of the United States: No person shall be deprived of life, liberty or property without due process of law.

2. Constitution of the State of New York, Article I, Section 6: No person shall be deprived of life, liberty or property without due process of law.

3. Vehicle & Traffic Law, Sections 1192 & 1194. (See Appendix.)

E. A concise statement of the case is as follows:

Petitioner was arrested May 31, 1958, at approximately 9:00 P.M. in the Town of Webster, Monroe County, New York, charged with violation of New York State Vehicle and Traffic Law, formerly Section 70 Sub. 5, now Section 1192, for driving while intoxicated. He was taken to the Webster Police Station where he was asked by the New York State Trooper to take a chemical test to determine the alcoholic content of his blood. When requested by the officer to go to the hospital for a blood test, petitioner responded "I take a blood test if my lawyer advises me to. I told him to call my attorney". (Folio 31 through 39) Request was denied. (Folio 45.) Thereafter on August 20, 1958, petitioner's license was revoked by the Commissioner of Motor Vehicles. (Folio 21.) On a proceeding to review, Appellate Division Fourth Department reported 14 AD 2nd 503. (Folio 67 through 78) annulled the determination of the Commissioner on the law and the facts, and decided that the thrust of the amendment to Section 71A Vehicle and Traffic Law by Chapter 320 of the Laws of 1954 of the State of New York is that: "The police officer must proceed in accordance with the rules prescribed for criminal proceedings, including giving an arrested person opportunity to consult with counsel, if he requests permission". The statute was amended to overcome the unconstitutionality of Section 71A Vehicle and Traffic Law which was determined by Schatt vs. MacDuff, 205 Misc. 43. The point of the MacDuff decision was that the former 71A was unconstitutional because it

authorized the taking away of a driver's license without a hearing. The amendment to 71A Vehicle and Traffic Law, now Section 1194, provides for a hearing before the license can be taken away. The petitioner was acquitted of the criminal charge although that fact does not appear in the record. The statute, 1194, provides for revocation of a driver's license if a person, after arrest and then having been requested to submit to a chemical test, refuses to submit to the test. This statute appears in the appendix.

F. The federal question sought to be reviewed involved in this proceeding, is set out herein at paragraph C of this petition. The right to counsel mandated by the due process clause of the Constitution arose first in the petition for review. (Folio 13.) That right was agreed to by the Appellate Division, Fourth Department, (Folios 69-70), to the effect that the amendment to Vehicle and Traffic Law 71A now 1194, meant that the officer must proceed in accordance with the rules prescribed for criminal proceedings, including the right to counsel. That determination was reversed by the Court of Appeals. The Court of Appeals held, in its memorandum, "The Constitutional rights of the petitioner were not invaded because of the refusal of his request of counsel"; in the second last paragraph of the concurring opinion of Van Voorhis, J., "The revocation of his license by the Commissioner of Motor Vehicles is to be regarded as though it were done in a civil administration proceeding. The right to counsel mandated by due process of law is confined to the criminal prosecution which terminated in his favor". The federal question regarding due process of law was therefore timely raised in the very beginning of petitioner's proceeding to review the revogation by the Motor Vehicle Bureau, it was specifically passed upon by the Appellate Division Fourth Department in petitioner's favor, and specifically denied in the opinion of the Court of Appeals.

G. Review of a judgment of a federal government is not sought:

H. The reasons relied on for the allowance of writ of certiorari are as follows:

a. The Court of Appeals of the State of New York has decided a federal question of substance, to wit: The absence of the right of a person to counsel, mandated by the due process clause of the Constitution, prior to submitting to a chemical test to determine the alcoholic content of his blood, after having been arrested for driving while intoxicated. On information and belief this question has not been determined by the United States Supreme Court. The Court of Appeals in this proceeding has decided the federal question in a way probably not in accord with the decisions of this Court, to wit: It has determined that the right to counsel does not apply to a civil administrative proceeding but is confined only to criminal prosecution. This is an important question to be settled by this Court. That further the decision of the Court of Appeals violated the concept of due process in the context of this particular proceeding. Essentially it is unfair to take petitioner's license because of his unwillful and unqualified refusal to submit to a blood test without the aid of counsel; in short, by asking for his lawyer, petitioner lost his license. The Court of Appeals held, he refused to take the test. Further the Court of Appeals had decided this important question of federal law in a way in conflict with the applicable law of the State of New York, People vs. Noble, 9 NY 2nd 571. It is true that the Noble case dealt with criminal proceeding. Petitioner urges that where the punishment for violation of a civil statute, to wit: Loss of license under 1192 Vehicle and Traffic Law, is the same as the punishment for conviction of driving while intoxicated, to wit: Loss of license, that all of the safeguards of due process applicable to criminal proceedings should also be ap

plied to a civil administrative proceeding. The petitioner could call his Doctor, Vehicle and Traffic Law 1194, before he took the test, but not his lawyer.

b. The petitioner further relies on the decision of the Appellate Division Fourth Department, 14 AD 2nd 503, in this case, (Folios 67-78) for the allowance of the Writ.

I. Appended hereto is a copy of the opinion of the Court of Appeals delivered upon the rendering of the judgment sought to be reviewed. The opinion of the Appellate Division Fourth Department, reported in this case, 14 A.D. 2nd 503, is contained in the transcript of record. (Folio 67 through 78.) There were no other opinions in this case.

J. The order reversing the Appellate Division and reinstating the determination of the Commissioner of Motor Vehicles is annexed to the opinion of the Court of Appeals.

K. No previous application for the relief asked for herein has been made.

WHEREFORE petitioner prays for a Writ of Certiorari to review the decision of the Court of Appeals of the State of New York and for such other relief as may be proper.

ANTONIO FINOCCHIARO.

STATE OF NEW YORK
County of Monroe } ss:
Town of Webster

ANTONIO FINOCCHAIRO, being duly sworn deposes and says that he is the petitioner in this action; that he has read the foregoing petition and knows the contents thereof; that the same is true to the knowledge of petitioner, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

ANTONIO FINOCCHAIRO

Sworn to before me this
9th day of April, 1962.

William L. Maier,
Notary.

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APPENDIX

OPINION

STATE OF NEW YORK—COURT OF APPEALS

In the Matter of the Application of Antonio Finocchairo,
Respondent,

vs.

Joseph P. Kelly, Commissioner of Motor Vehicles,
Appellant.

MEMORANDUM:

The order appealed from should be reversed and the determination of the Commissioner of Motor Vehicles revoking the operator's license of petitioner reinstated. So far as the revocation of petitioner's license for his conditional refusal to take a blood test is concerned, the constitutional rights of petitioner were not invaded because of the refusal of his request for counsel.

VAN VOORHIS, J. (concurring):

Petitioner-respondent was placed under arrest on a charge of driving while intoxicated and taken to a State Police substation where he was asked to submit to a blood test. Under the statute (§ 71 a of the Vehicle & Traffic Law, as it then was, now §§ 1192-1194) he could be required to choose whether or not to submit to a test to determine the alcoholic content of his blood, while under arrest if the officer had probable cause to believe him to have been driving while intoxicated. His operation of the vehicle upon the highways of the State is deemed to constitute a consent—not that the blood test be

taken, but to being obligated o make a choice whether to take the test or to refuse to take the test. If the driver refuses to take the test the statute provides that his operator's license shall be revoked.

Under the facts as found by the Appellate Division, this man, after he had been arrested and brought to the substation, asked permission to telephone to his lawyer before deciding whether to submit to the test, but was told that he could not consult with a lawyer before making that decision even by telephone. He thereupon declined to submit to the test in consequence whereof his license has been revoked.

The Appellate Division held that he had a constitutional right to consult with counsel provided that he did so promptly, and that refusal to permit him to do so deprived the Commissioner of Motor Vehicles of power to revoke the license. That was on the theory that he was under arrest on a criminal charge and that due process of law required that he have opportunity to consult counsel, citing *People v. Noble*, 9 N. Y. 2d 571, 574-575.

The soundness of that reasoning depends upon whether respondent was applying to consult counsel before taking some step in a criminal prosecution (*People v. Noble, supra; People v. DiBiase*, 7 N. Y. 544; *People v. Meringie*, 2 N. Y. 2d 181; *People v. Banner*, 5 N. Y. 2d 109; *People v. Cooper*, 307 N. Y. 253; *People v. Tomassilli*, 7 N. Y. 2d 350; *People v. Silverman*, 3 N. Y. 2d 200; *People v. Hannigan*, 7 N. Y. 2d 317; *People v. Spano*, 160 N. Y. 315; *Cutombo v. Connecticut*, 367 U. S. 568; *Hudson v. North Carolina*, 363 U. S. 697).

By the same token it seems to me, as it did to the Appellate Division, that it was in violation of due process of law *as part of a criminal prosecution* to have refused respondent opportunity to telephone to his lawyer. The Appellate Division's

opinion stated that "an unreasonable delay need not be countenanced. In this case, there is nothing to show that the attorney could not have been reached by telephone promptly." Due process of law is a concept which varies according to the context, but the substance of it is "ingrained in our national traditions" and "Fairness of procedure is 'due process in the primary sense.' (*Brinkerhoff Faris Trust & Sav. Co. v. Hill*, 281 U. S. 673, 681)." *Joint Anti-Fascist Refugee Com. v. McGrath* (341 U. S. 123, 161.) Bearing in mind, as is further said in the case just cited in the opinion of the Court by Mr. Justice Frankfurter, that due process "is not a technical conception with a fixed content unrelated to time, place and circumstances," and representing, as that opinion states, "a profound attitude of fairness between man and man, and more particularly between the individual and government," it seems to me clear that the substance of this important but flexible constitutional safeguard required that respondent, having been arrested on a criminal charge, should be afforded opportunity on request to telephone to his lawyer provided that he could have reached him promptly. Manifestly the necessities of the case would not allow a request to consult a lawyer to result in unreasonable delay, as the majority at the Appellate Division stated, nor could it be used as an excuse for escaping the election which the statute enforced upon a person in appellant's situation. If respondent had been told that he could consult with a lawyer by telephone or otherwise, provided that he did so within half an hour, for example, there would be little room for doubt that due process of law had been met. The Vehicle & Traffic Law provides that to be effective the blood test must be taken within two hours of the time of arrest (§ 1192(3)). Due process does not, in my opinion, require that delay be countenanced so as to render ineffective the beneficent purposes served by requiring such a person to submit to that kind of test. Upon the other hand, fairness of procedure in a criminal

prosecution under the concept of due process of law does require (as is held in other cases involving the most serious crimes against society) that suitable opportunity to consult with counsel be granted. Respondent was entitled, if he could have done so promptly, to consult with his lawyer about the bearing which the test might have upon his possible conviction under the criminal charge. He was entitled thus to verify the statement of the officer that he was obliged to submit to such a test or lose his license and also to advise with his lawyer in regard to the regularity of procedure proposed for the taking of the test, and the right on his part, expressly given to him by the same statute, to have a test made of his own in order to verify the correctness of the test to be taken by the People. Driving upon the highways while intoxicated is a serious menace. So are murder, robbery, rape and other felonies where the courts have been sensitive to a high degree in allowing the right to counsel. In fact, that is the ground most frequently adduced in support of writs of error coram nobis. If taking a blood test had not been mentioned, respondent would have had a constitutional right to counsel under the decisions above cited. Is a defendant to be denied that right, subject to reasonable limitations, by being told to take the test? If a defendant can be deprived of the right to counsel when charged with driving while intoxicated, what is to prevent the withholding of that constitutional right in other situations where the intervention of a lawyer might be regarded as contrary to insistent demands of society?

In this instance respondent did not take the test and was acquitted of the criminal charge. Having been acquitted, he is not in position to complain that he was injured in the criminal action. Therefore, as I view it, the dissenting Justices of the Appellate Division were correct in concluding that the revocation of his license by the Commissioner of Motor Vehicles is to be regarded as though it were done in a civil administrative

proceeding. The right to counsel mandated by due process of law is confined to the criminal prosecution which terminated in his favor.

For these reasons I concur in the reversal of the order appealed from and the reinstatement of the determination of the Commissioner of Motor Vehicles revoking respondent's operator's license. Whether any constitutional rights of respondent would have been violated if the case were here on appeal from a judgment of conviction of driving while intoxicated, after submitting to a blood test administered without suitable opportunity promptly to consult with counsel, is not presented by this record.

* * * * *

Order reversed and the determination of the Commissioner of Motor Vehicles reinstated, without costs, in a memorandum. No opinion. All concur; Van Voorhis, J., in a concurring memorandum in which Burke, J., concurs.

VEHICLE AND TRAFFIC LAW

§ 1194. *Chemical tests.* 1. Any person who operates a motor vehicle or motorcycle in this state shall be deemed to have given his consent to a chemical test of his breath, blood, urine, or saliva for the purpose of determining the alcoholic content of his blood provided that such test is administered at the direction of the police officer having reasonable grounds to believe such person to have been driving in an intoxicated condition or, while his ability to operate such motor vehicle or motorcycle was impaired by the consumption of alcohol, and in accordance with the rules and regulations established by the police force of which he is a member. If such person having been placed under arrest and having thereafter been requested to submit to such chemical test refuses to submit to such chemical test the test shall not be given but the commissioner shall

revoke his license or permit to drive and any non-resident operating privilege; provided, however, the commissioner shall grant such person an opportunity to be heard but a license, permit or non-resident operating privilege may, upon the basis of a sworn report of the police officer that he had reasonable grounds to believe such arrested person to have been driving in an intoxicated condition or, while his ability to operate such motor vehicle or motorcycle was impaired by the consumption of alcohol, and that said person had refused to submit to such test, be temporarily suspended without notice pending the determination upon any such hearing. The provisions of subdivisions five and six of section five hundred ten of this law shall be applicable to revocations under this section.

2. Upon the request of the person who was tested, the results of such test shall be made available to him.

3. a. No person except a physician acting at the request of a police officer shall be entitled to withdraw blood for the purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of a urine, saliva or breath specimen.

b. No physician or hospital employing such physician shall be sued or held liable for any act done or omitted in the course of withdrawing blood at the request of a police officer pursuant to this section.

c. Any person who may have a cause of action arising from the withdrawal of blood as aforesaid, for which no personal liability exists under paragraph b of this subdivision, may maintain such action against the state if the physician acted at the request of a police officer employed by the state, or against the appropriate political subdivision of the state if the physician acted at the request of a police officer employed by a political subdivision of the state. No action shall be main-

tained pursuant to this paragraph unless notice of claim is duly filed or served in compliance with law.

d. Notwithstanding the foregoing provisions of this subdivision, an action may be maintained by the state or a political subdivision thereof against a physician or hospital employing such physician for whose act or omission the state or the political subdivision has been held liable under this subdivision, to recover damages, not exceeding the amount awarded to the claimant, that may have been sustained by the state or the political subdivision by reason of gross negligence or bad faith on the part of such physician.

4. The person tested shall be permitted to have a physician of his own choosing administer a chemical test in addition to the one administered at the direction of the police officer.

§ 1192. *Operating motor vehicle or motorcycle while in an intoxicated condition or while ability to operate is impaired by the consumption of alcohol.* 1. Whoever operates a motor vehicle or motorcycle while his ability to operate such motor vehicle or motorcycle is impaired by the consumption of alcohol shall be guilty of a traffic infraction. No conviction shall be had under this subdivision after entry of a plea of not guilty unless it is shown by means of a chemical test administered under section eleven hundred ninety-four that there was, within two hours of the defendant's arrest, ten hundredths of one per centum or more by weight of alcohol in his blood.

2. Whoever operates a motor vehicle or motorcycle while in an intoxicated condition shall be guilty of a misdemeanor and shall be punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both. Whoever operates a motor vehicle or motorcycle while in an intoxicated condition after having been convicted of operating a motor vehicle or

motorcycle while in an intoxicated condition shall be guilty
a felony and shall be punishable by imprisonment for not
than sixty days nor more than two years or by a fine of
less than two hundred dollars nor more than two thousand
lars, or by both such imprisonment and fine. For the purpo
of this section a prior conviction for operating a motor ve
or motorcycle while in an intoxicated condition shall be lim
to those convictions had within ten years of the time of
instant alleged offense.

3. Upon the trial of any action or proceeding arising
of acts alleged to have been committed by any person arre
for operating a motor vehicle or motorcycle while in an int
cated condition or while ability to operate is impaired by
consumption of alcohol, the court may admit evidence of
amount of alcohol in the defendant's blood taken within
hours of the time of the arrest, as shown by a medical or ch
ical analysis of his breath, blood, urine, or saliva. For
purposes of this section the evidence that there was, at the t
five hundredths of one per centum, or less, by weight of alc
in his blood is prima facie evidence that the defendant w
in an intoxicated condition, and evidence that there was, at
time, more than five hundredths of one per centum and
than fifteen hundredths of one per centum by weight of alc
in his blood is relevant evidence but is not to be given pr
facie effect in indicating whether or not the defendant w
an intoxicated condition. The evidence that there was, at
time, ten hundredths of one per centum, or more, by weigh
alcohol in his blood, may be admitted as prima facie evid
that the defendant's ability to operate a motor vehicle or m
cycle was impaired by the consumption of alcohol, and evid
that there was, at the time, fifteen hundredths of one per
tum, or more, by weight of alcohol in his blood, may be
mitted as prima facie evidence that the defendant was
intoxicated condition.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 906

In the Matter of the Application
of
ANTONIO FINOCCHIARO,

Petitioner,

against

JOSEPH P. KELLY, Commissioner of Motor Vehicles,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

We oppose the granting of the petition for the reasons that the decision of the Court of Appeals (11 N. Y. 2d 58) rests on a non-Federal ground adequate to support it and the alleged Federal question lacks substantiality.

Statement

On the night of May 31, 1958, State Trooper Ralph A. Wulff was proceeding on Route 104 in the Town of Webster, New York, when he observed petitioner, Antonio Finocchairo, operating a truck thereon. The road consisted of three lanes. The truck swerved from the right hand lane to the center lane and then back again to the right hand lane; the driving was erratic. Petitioner stopped

his vehicle at a red light; it was in the middle of the right hand lane. The trooper ordered petitioner to pull over to the shoulder of the road. Finally, he did so. The trooper detected the odor of alcohol on petitioner's breath. Petitioner could not stand; "he kind of fumbled a little bit, he kept swaying back and forth; his eyes were watery and glassy; argumentative; not cooperative one moment and the next moment he would be" (31-35)*. He was incoherent (44).

The trooper arrested petitioner, charging him with driving while intoxicated. He took him to the State Police substation in Webster and asked him to take a blood test. Petitioner replied he would not do so without talking to his lawyer. He did not say he would take the test if his lawyer advised him to do so (35-36, 44).

Following a hearing, at which petitioner was represented by counsel, the Commissioner of Motor Vehicles revoked petitioner's license for refusing to take the blood test.

Petitioner informed the Appellate Division that he was acquitted of the criminal charge.

ARGUMENT

1.

The right to counsel mandated by the Federal Constitution applies to criminal proceedings only and not to a civil administrative proceeding such as this.

Beyond question, this proceeding to review a license revocation is a civil one. In his brief in the Court of Appeals, petitioner conceded that he made no claim that the

* Folio numbers of Record.

instant matter was anything other than an administrative proceeding. The right to counsel vouchsafed by virtue of the Sixth Amendment relates solely to criminal proceedings. In the instant matter petitioner successfully defended the criminal charge. He appeared with and was represented by counsel at the motor vehicle hearing.

Petitioner has suffered no infringement of a Federal constitutional right.

In Re Groban, 352 U. S. 330 (1957);
Smith v. *General Truck Drivers, etc., Union Local*, 181 F. Supp. 14 (U. S. Dist. Ct., S. D. Cal., 1960).

2.

The determination of the Court of Appeals that petitioner refused to submit to the blood test constituted an adequate, non-federal ground for its decision.

Whether petitioner's conduct upon the occasion of the state trooper's request that he submit to the blood test constituted a refusal within the New York statute is purely a non-federal question. The Court of Appeals has decided this question adversely to petitioner. In these circumstances, this Court will not review the decision of the State court.

Fox Film Corp. v. *Muller*, 296 U. S. 207 (1935);
Berea College v. *Kentucky*, 211 U. S. 45, 53 (1908).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York, May 3, 1962.

Respectfully submitted,

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